Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Application of	
ECHOSTAR COMMUNICATIONS CORPORATION, **GENERAL MOTORS CORPORATION,** **HUGHES ELECTRONICS CORPORATION,**	***EXPEDITED ACTION REQUESTED***
Transferors, and	CS Docket No. 01-348
ECHOSTAR COMMUNICATIONS CORPORATION,	
Transferee,	
For Authority to Transfer Control.	

To: The Presiding Officer and Chief Administrative Law Judge

REQUEST TO CERTIFY QUESTION
AS TO WHETHER HEARING SHOULD BE HELD

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November 18, 2002

SUMMARY

Pursuant to Section 1.106(a)(2) of the Commission's Rules, 47 C.F.R. § 1.106(a)(2), EchoStar Communications Corporation ("Echostar"), General Motors Corporation ("GM") and Hughes Electronics Corporation ("Hughes"), a subsidiary of GM (collectively, the "Applicants"), hereby request that the Presiding Officer to be appointed in this proceeding certify to the Commission the question of whether a hearing should be held, in light of the Commission's policies, including its broadband promotion policy and its policy vis-à-vis merger synergies, as reflected in its recent approval of the AT&T/Comcast merger,[1] and based on undisputed facts. In the Applicants' view, these policies "obviate the need for a hearing,"[2] or at least create "substantial doubt" as to whether a hearing should be held,[3] and militate for grant of the merger application without a hearing.

The Commission has set the proposed merger of EchoStar and Hughes for a hearing on the ground that the "claimed benefits of efficient and expeditious use of spectrum are outweighed by the potential harms associated with the concentration of ownership of key DBS spectrum licenses."[4] Based on the Commission's broadband policies cited as the primary basis for approval for the AT&T/Comcast merger, it appears that the Commission has erred in completely disregarding the broadband benefits to flow from the EchoStar/Hughes merger.

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[1] *See In the Matter of Applicants for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors. to AT&T Comcast Corporation, Transferee,* Memorandum Opinion and Order, MB Docket No. 02-70, FCC 02-310 (rel. Nov. 14, 2002).

[2] *See Summary Decision Procedures,* 34 FCC 2d 485 (1972) at ¶ 13.

[3] *See* 47 C.F.R. § 1.106(a)(2).

[4] *See In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, Hearing Designation Order, CS Docket No. 01-348, FCC 02-284 (rel. Oct. 18, 2002) ("*HDO*") at ¶ 3.

Simply put, each of Comcast and AT&T is already an established (indeed, a dominant) broadband provider on a stand-alone basis. Accordingly, AT&T and Comcast were only able to argue that their merger would give them the financial wherewithal and scale to ***accelerate*** the existing pace of their broadband deployment. In stark contrast, it is an indisputable fact that neither EchoStar nor Hughes is an established residential broadband provider today. The two DBS providers have shown, largely with evidence that is undisputed **in** the record, that the merger will allow New EchoStar to ***become*** an effective provider of residential broadband service. For this and other reasons, the broadband benefits claimed by the Applicants here ***(creation*** of a broadband provider nationwide versus mere *acceleration* of existing broadband deployment) are less "speculative," more "credible" and more "merger-specific" than those claimed by AT&T and Comcast.

Yet the Commission approved the cable giants' merger primarily on the basis of these tenuous claims of broadband benefits while disregarding completely the stronger claims made here by the Applicants. In the Applicants' view, correcting for that error would dramatically tilt the balance in favor of approving the merger, creating "substantial doubt" as to whether a hearing should be held: in light of the Commission's strong policy of promoting broadband deployment, the broadband benefits of the merger would overwhelmingly outweigh the harms, even if the remaining benefits and competitive harms of the merger were viewed in the least favorable light for the Applicants.

In addition, based on the Commission's policy of recognizing fundamentally uncertain synergy estimates, again as reflected in the *AT&T/Comcast* decision, where the synergy claims were "incomplete" and "inherently inexact" by the parties' own admission, it appears that the Commission held EchoStar and Hughes to a much higher (and impossible to

meet) standard of certitude. Moreover, in contrast with its treatment of merger benefits in the *AT&T/Comcast* proceeding, the Commission applied a double standard in comparing New Echostar's capabilities with the stand-alone capabilities of each company, resulting in an unreasonable diminution of the former and aggrandizement of the latter. In doing so, the Commission significantly underestimated many other synergy benefits claimed by the Applicants.

Furthermore, correcting for other errors in the Commission's application of its policies, it becomes clear that not only are the merger's benefits significantly greater than the Commission has estimated in the *HDO*, but that the purported competitive problems are also substantially less serious.

Finally, on undisputed facts, the Commission has also misapplied its policy of promoting the interest of rural consumers. Correct application of that policy tilts the benefit/harm balance even further in favor of grant, and at least creates "substantial doubt" as to whether a hearing should be held. Even under the Commission's own analysis of each applicant's ability to provide local-into-local service, it is another undisputed fact that 110-130 Designated Market Areas **("DMAs")** will probably never get local stations by satellite without the merger. The Commission has improperly dismissed that **risk** by reasoning that these areas account for only a "small percentage" of the nation's population -- 15% - 20% of TV households. The Commission's casual dismissal of this "small percentage" of TV households is surprising because it includes millions of rural subscribers in numerous states.

The Applicants soon plan to request suspension of the hearing pending Commission review of a remedial proposal that the Applicants plan to submit, as invited by the Commission in the *HDO*. The Applicants are filing this request today because November 18,

2002 is the due date for Section 1.106(a)(2) requests under the Commission's Rules, **see** 47 C.F.R. §§ 1.106(a)(2), (f), 1.4(b). The Applicants respectfully submit that the Presiding Officer, or the Chief Administrative Law Judge prior to the appoiniment of the Presiding Officer, need rule on the instant request only if the Commission decides not to suspend the hearing or, having suspended it, restarts the hearing process.

The Agreement and Plan of Merger between EchoStar and Hughes contains several termination provisions, including, among other things, provisions that permit Hughes to terminate the transaction under certain circumstances if Commission approval is not received on or before January 6, 2003, or if the merger is not consummated by January 21, 2003. Accordingly, the parties urgently need Commission resolution before the effective termination dates; only expedited action can secure meaningful relief for the parties, and for consumers. Therefore, the Applicants urge that the Presiding Officer or Chief Administrative Law Judge act upon this request as soon as possible if the Commission does not suspend the hearing. At the same time, as noted above, this request is not intended to waive Applicants' right to file an amendment to their Application and seek a suspension of the hearing pending review of the amendment as invited by the Commission in the *HDO*.

TABLE OF CONTENTS

Page

SUMMARY i

I. THE COMMISSION HAS MISAPPLIED ITS POLICES IN ASSESSING THE BENEFITS AND HARMS OF THE MERGER 3

11. THE COMMISSION HAS ABDICATED ITS STATUTORY RESPONSIBILITY TO PROMOTE THE INTERESTS OF RURAL SUBSCRIBERS, WHO, WHILE FEW IN NUMBER, LIVE IN THE MANY UNDERSERVED AREAS OF THE COUNTRY 21

111. THE *HDO* MISSTATES THE COMMISSION'S SPECTRUM POLICY PRECEDENT 23

IV. CONCLUSION 24

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Applicants' view, these policies "obviate the need for a hearing,"[2] or at least create "substantial doubt" as to whether a hearing should be held,[3] and militate for grant of the merger application without a hearing.

The Applicants soon plan to request suspension of the hearing pending Commission review of a remedial proposal that the Applicants plan to submit, as invited by the Commission in the *HDO*. The Applicants are filing this request today because November 18, 2002 is the due date for Section 1.106(a)(2) requests under the Commission's Rules, ***see*** 47 C.F.R. §§ 1.106(a)(2), (f), 1.4(b). The Applicants respectfully submit that the Presiding Officer, or the Chief Administrative Law Judge, prior to the appointment of the Presiding Officer, need rule on the instant request only if the Commission decides not to suspend the hearing or, having suspended it, restarts the hearing process.[4]

The Agreement and Plan of Merger between EchoStar and Hughes contains several termination provisions, including, among other things, provisions that permit Hughes to terminate the transaction under certain circumstances if Commission approval is not received on or before January 6, 2003, or if the merger is not consummated by January 21, 2003. Accordingly, the parties urgently need Commission resolution before the effective termination dates; only expedited action can secure meaningful relief for the parties, and for consumers.

Transferee, Memorandum Opinion and Order, MB Docket No. 02-70, FCC 02-310 (rel. Nov. 14, 2002) ("*AT&T/Comcast* ***Order").***

[2] ***See Summary Decision Procedures,*** 34 FCC 2d 485 (1972) at ¶ 13; ***see*** *also* Satellite ***Business Systems,*** 62 FCC 2d 997 (1977) at ¶ 198.

[3] ***See47*** C.F.R. § 1.106(a)(2).

[4] ***See*** *In* ***the Matter*** *of Summary* ***Decision Procedures,*** 34 FCC 2d 485 (1972), at ¶ 13 (explaining that while the procedure allowing petitions for reconsideration of hearing designation orders was replaced with the summary decision procedure under Rule 1.251, Rule 1.106(a)(2) was adopted to afford access, through the presiding officer, to Commission reconsideration where a question of Commission policy is involved)

Therefore, the Applicants urge that the Presiding Officer or Chief Administrative Law Judge' act upon this request as soon as possible if the Commission does not suspend the hearing. At the same time, as noted above, this request is not intended to waive Applicants' right to file an amendment to their Application and seek a suspension of the hearing pending review of the amendment as invited by the Commission in the *HDO*.[6]

I. THE COMMISSION HAS MISAPPLIED ITS POLICIES IN ASSESSING THE BENEFITS AND HARMS OF THE MERGER

Broadband. Based on the record evidence, the HDO found that the "Applicants have failed to demonstrate that the merger will result in cognizable public interest benefits related to satellite broadband service," on the ground that the Applicants' benefit claims are "speculative and not credible and do not appear to be merger-specific." ***HDO*** at ¶ 229. The Commission's disposition of the Applicants' claimed broadband benefits is inconsistent with the Commission's wholehearted acceptance of much weaker claims in the case of AT&T/Comcast. Consistent treatment would create "substantial doubt" as to whether a hearing should be held, since it would in all likelihood justify approval of this merger without need for a hearing.

As the Applicants have pointed out, the broadband benefits flowing from the merger are in fact less speculative, more credible and more merger-specific in several respects than those claimed by the parties in the AT&T/Comcast merger. Here, neither company will likely provide a widely used residential broadband offering standing alone;[7] the broadband

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[5] Pursuant to Section 0.0351 "[t] Chief Administrative Law Judge shall act on the following matters in proceedings conducted by hearing examiners . . . (f) All pleadings filed, or matters which arise, after a proceeding has been designated for hearing, but before a law judge has been designated, which would otherwise be acted upon by the law judge . . . ."

[6] See *HDO* ut ¶ 295.

[7] See, *e.g.*, Applicants' **Ex** Parte Broadband Presentation to the Commission's Merger Task Force (June 12, 2002) ("Broadband Presentation") at 5-26 (explaining in detail why the

benefits will result directly from the combination of the two companies' subscriber bases and spectrum resources;[8] satellite broadband deployment will usher in competition against the cable video/broadband bundle;[9] and it will benefit all consumers nationwide." Moreover, the Applicants have submitted detailed and unrebutted econometric models backing their claim that the merger will ***create*** a viable broadband competition.[11]

In the AT&T/Comcast transaction, on the other hand, each company already occupies a dominant position in the provision of high-speed access in its franchise areas; the claimed benefits will allegedly arise chiefly from the merged company's improved ability to finance broadband deployment; this additional deployment **will** entrench further cable dominance as opposed to introducing new competition; and it will not benefit consumers outside the parties' franchise areas. ***See*** Applicants' Ex Parte Reply Comments at 7 n.15 (Oct. 8, 2002). Finally, it appears that the cable applicants did not submit *any* econometric evidence that the merger would even accelerate the existing pace of broadband deployment. Specifically, the Applicants' review of the public record in the *AT&T/Comcast* proceeding suggests that the

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economics of the companies' standalone efforts are unfavorable); **see** *also* Applicant's Ex Parte Submission (July 30, 2002) ("Broadband Economic Models").

[8] ***See*** ***id.*** at 28-41 (demonstrating that the combination of subscriber bases and spectrum resources is key to achieving the scale necessary to create a competitive satellite broadband service).

[9] *See* Broadband Presentation at 43-48 (explaining that the combination will create effective, facility-based competition with cable modem and DSL technology, that will be comparable in price and performance and will serve as a competitive constraint on cable and DSL providers' pricing and service).

[10] *Id.* at 44 (the combination will help bridge the digital divide by bringing broadband service to some 40 million households currently not served by DSL or cable).

[11] *See* Broadband Economic Models

applicants provided no support whatsoever backing their conclusory assertion of $1.25-1.95 billion in merger synergies.[12]

Nevertheless, in *AT&T/Comcast* the Commission found that "the merged entity is likely to accelerate the deployment of broadband services in AT&T service areas," even though, as it recognized, "most cable providers are deploying broadband' anyway. *AT&T/Comcast* ***Order*** at ¶ 112. The rationale for this finding is at every turn inconsistent with the Commission's complete dismissal of the broadband claims in the Echostar-Hughes merger proceeding.

To justify its conclusion in *AT&T/Comcast*, the commission reasoned primarily that Comcast "has been able to upgrade its plant more quickly than AT&T . . .," and therefore "applying this expertise to the AT&T cable systems is likely to have a positive impact on the deployment of broadband to AT&T subscribers that currently do not have access to those services." *Id.* Comparison of these findings to the *HDO* discussion suggests the absurd proposition that a broadband benefit ***is*** more merger-specific when one of the two merger providers is a very effective broadband provider already than when neither provider is an effective provider today.

> The Commission in *AT&T/Comcast* next reasoned that:
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> the greater scale and scope of the merged entity is likely to spur new investment. The development and deployment of new

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[12] ***See*** AT&T and Comcast simply included in their application the unsupported assertion that the merger "should result in synergies and efficiencies worth approximately $1.25 to $1.95 billion a year in increased earnings before interest, tax, depreciation and amortization ("EBITDA")." AT&T/Comcast Application, Declaration of Robert Pick, at 3. Later in the proceeding, the applicants merely reaffirmed this estimate, **see** Letter from **A.** Renee Callahan, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary, FCC, at 28 ("Value Creations Through Synergies") (Redacted Version) (July 2, 2002), this time dividing the estimated merger synergies into the following five categories with no further backup: (1) "programming cost savings"; (2) "continued operating efficiencies"; (3) "national advertising platform"; **(4)** "new products"; and (5) "Comcast telephony." *See* ***id.***

> technologies often entails significant up-front, fixed investment. The merged company should have a greater ability to spread those fixed costs across a larger customer base, which should in turn foster incentives for investment by the merged entity. . . .

AT&T/Comcast Order at ¶ 113. This passage is impossible to reconcile with the Commission's total rejection of these very same claims made by EchoStar and Hughes, especially because the need to spread the huge fixed costs over a large subscriber base is much more evident in the EchoStar/Hughes merger[13] – after all, each of AT&T and Comcast has been able to overcome these fixed-cost hurdles and to provide substantial residential service on a stand-alone basis, whereas the same obstacle has proved debilitating for Echostar's and Hughes's efforts.

Finally, the Commission reasoned that, "to the extent Comcast and AT&T each have particular expertise in electronic commerce and customer care that they can bring to the merged entity, that also should contribute positively lo consumer experience." *Id.* That is a completely speculative proposition that could be used to "prove" almost any benefit asserted by almost any two merger partners. Reliance on such a truism by the Commission strikes a particularly dissonant chord with the Commission's disregard for the econometric evidence of scope and scale economies submitted by EchoStar and Hughes[14] – evidence absent from the filings of AT&T and Comcast.

In short, the FCC approved the merger of the two cable giants based primarily on the asserted ***acceleration*** of the pace of broadband deployment that is happening already without the merger, and failed to credit the EchoStar/Hughes merger's much more concrete promise – the ***creation*** of an effective broadband provider. Application of the broadband policy evident in the

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[13] ***See.*** *e.g.*, Broadband Presentation at 22 (describing the multi-billion dollar upfront costs needed to implement a competitive satellite broadband service).

[14] ***See generally*** Broadband Economic Models.

AT&T/Comcast merger would compel the recognition of much more substantial benefits in this proceeding and likely tilt the balance of benefits and harms towards grant of the application without need for a hearing.

In further contrast with its treatment of weaker claims of merger specificity in *AT&T/Comcast*, the Commission has also overstated the ability of each of the Applicants to provide this service on its own, even as it has discounted New Echostar's ability to do so. As with local-into-local service, the Commission has focused its analysis exclusively on spectrum constraints – a simple multiplication of the number of each company's orbital slots by the number of subscribers that could be served from each slot." Based on this simplistic arithmetic, the Commission has concluded that one company could reach the critical mass of 5 million subscribers, while the other company could approach that number.[16]

The need for enough spectrum is an important factor, and the Commission's overly simplistic analysis was incorrect because it assumed away the current constraints on the use of Ka-band spectrum." But, even more important, if spectrum constraints were the only issue, satellite broadband service would be flourishing today – many possible combinations of Ka-band licensees would have enough slots to serve the needed number of subscribers. The most serious problem, of course, is the high cost of actually deploying residential broadband

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[15] *HDO* at ¶ 232.

[16] *Id.*

[17] For example, the Commission erroneously assumed in its calculation that Hughes had unencumbered access to 720 MHz of Ka-band spectrum for its Ka-band satellites. ***See*** *HDO* at ¶ 232 n.554. In fact, however, the Applicants demonstrated that Hughes SPACEWAY is not able to use 220 MHz of this spectrum for its services, and it is designed to use spectrum only in 500 MHz segments -- it is not feasible to change the design of the SPACEWAY system at this late date. **See** Opposition to Petitions to Deny and Reply Comments (filed Feb. 25, 2002) at 102-105 ***("Opposition").***

service to end users– the cost of consumer premises equipment and corresponding expense of acquiring subscribers.[18] These costs have led EchoStar to withdraw from its residential broadband venture and Hughes to announce that it will likely discontinue its own residential broadband offering." The Commission suggests that EchoStar's withdrawal from Starband may have been inspired by EchoStar's desire to influence the outcome of the proceeding, and faults EchoStar for not disproving that possibility.[20] That reasoning is wrong, for two reasons: *first*, it is based on nothing more than speculation about EchoStar's motives offered by NRTC. EchoStar should not have to prove the negative.[21] *Second*, EchoStar has in fact shown that it lost

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[18] *See, e.g.*, Broadband Presentation at 11, 13-14 (demonstrating that satellite consumer premises equipment costs are not competitive with those of cable and DSL, and describing the role played by satellite's subscriber acquisition costs in the unfavorable economics of today's satellite broadband offerings).

[19] *See id.* at 6-7.

[20] *See HDO* at ¶ 239.

[21] *See, e.g., In the Matrer of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* 12 FCC Rcd. 20543, 20568 (1997) ("We believe that shifting the burden of production once a BOC has presented a prima facie case that its application satisfies section 271 is appropriate, because parties opposing a BOC's application have the greatest incentive to produce, and generally have access to, information that would rebut the BOC's case. In addition, absent such a shift in the burden of production, a BOC applicant would be in the untenable position of having to prove a negative (that is, of coming up with, and rebutting arguments why its application might not satisfy the requirements of section 271."); *Pub. Citizen v. Dept. of State*, 276 F.3d 634, 645 (D.C. Cir. 2002) (finding that "'the task of proving the negative, that the information has not been revealed, might require the government to undertake an exhaustive, potentially limitless, search") (citations omitted); *National Communications Association, Inc. v. AT&T*, 238 F.3d 124, 131 (2nd Cir. 2001) ("[A]ll else again being equal, courts should avoid requiring a party to shoulder the more difficult task of proving a negative. 'The general rule is that the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim.'"); *Auburndale State Bank v. Dairy Farm Leasing Corp.*, 890 F.2d 888, 893 (7th Cir. 1989) (acknowledging "general rule" that "the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim") (citations omitted); *Tendler v. Jaffe*, 203 F.2d 14, 17 (D.C. Cir. 1952) (at a minimum, the party asserting the affirmative of an issue must introduce evidence on the issue, and generally has the burden of proof on the issue).

$100 million in pursuing the Starband venture." There is no rational explanation why the Commission should need more evidence of the reasons for Echostar's withdrawal.

The Commission has recognized the daunting costs of residential service in the *AT&T/Comcast* proceeding, even though they arc a lower hurdle for cable providers than for satellite operators – and a hurdle that cable providers appear to have overcome. In contrast, the Commission did not even acknowledge Hughes's statements that, precisely in light of these costs, the SPACEWAY system will likely be used only for enterprise service if the merger does not occur.[23] The Commission has ignored this crucial limitation and has wrongly assumed that SPACEWAY would be used for residential service without the merger.[24] Nor did the Applicants confine themselves to citing the unmistakable reality that satellite broadband has simply not taken off. They also submitted detailed econometric models taking into account the significant costs of residential broadband service, and showing that neither company standing alone could close the economic case for such a service, while New EchoStar would find it economic to provide it.[25] The Commission did not even acknowledge that evidence.

Inexplicably, the Commission did point to the dismal reality and prospects of the satellite broadband industry to question the merged entity's promises, but ignored the inhibiting effects of these same facts on the stand-alone capabilities of each company.[26] This is another example of the Commission's double standard: in the eyes of the Commission, the state of the

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[22] *See e.g., Ex Parte* Reply Comments of Applicants at 7 n.16 (Oct. 8, 2002); see also Broadband Presentation at 7..

[23] *See Opposirion* at 97-98.

[24] See *HDO* at ¶ 232.

[25] *See* Broadband Economic Models; *see also Opposirion* at 106-1 18 and attached declarations.

[26] *See HDO* at ¶ 239.

industry has no bearing on what each Applicant can achieve without the merger, but becomes relevant only to cast doubt on the prospects of New EchoStar. Again, the reverse is in fact the case: the merger can only lower the obstacles to residential broadband service by allowing the merged company to reach scale through the virtuous circle **of** a higher combined pool of DBS subscribers, lower equipment cost and lower subscriber acquisition costs. There is no rational possibility that the merger will actually heighten these existing impediments. It would be terrible if the result of that flawed analysis were to miss the unique opportunity to secure nationwide residential broadband service.

Ironically, the Commission appears to have applied the reverse double standard in the AT&T/Comcast merger: that decision appears to ***understate*** the merger parties' stand-alone capabilities (the *AT&T/Comcast Order* essentially disregards, for example, the fact that each is the dominant provider of high-speed access in its franchise areas). Conversely, the Commission appears to overstate the beneficial effect of the merger on broadband deployment. That effect is in fact unclear, since it relies on amorphous premises such as the importation of Comcast's "expertise" into AT&T franchise areas (where there is no reason to believe that AT&T's expertise is so limited). Correcting that inconsistency creates substantial doubt as to whether a hearing should be held in this proceeding.

Synergies. The Commission also refused to credit the efficiency benefits quantified exhaustively by the Applicants, on the ground that they were "highly speculative,'' not "credible," remote in the future and not "merger-specific."[27] In doing so, the Commission has disregarded submissions that exceeded in detail and documentation anything that **was** submitted by AT&T and Comcast to the Commission in that merger proceeding. By contrast, the

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[21] *Id.* at ¶¶ 160, 202-3, 208-9, 212, 227, 229, 235 and **243**

Commission accepted the cable operators' synergy claims even though they were demonstrably less fully substantiated, and even though they were by the parties' own admission "incomplete," "inherently inexact" estimates, many of them more than three years into the future. A comparison of the synergy presentations in the two proceedings shows that, under the Commission's policy of recognizing forward-looking policy estimates as exemplified in the *AT&T/Comcast* proceeding, here too the Commission should have recognized the Applicants' estimates, many of which were undisputed in the record, obviating the need for a hearing.

The Applicants specifically submitted a model tying the efficiency estimates to the merger, and followed up with detailed backup for each estimate.[28] The Applicants' synergies analysis examined in detail the positive revenue benefits of expanded local-into-local service; new services such as educational, foreign language and independent programming; HDTV programming; pay-per-view and near-video on demand; advertising interactive services; and the introduction of competitive satellite broadband service; as well as the reduction of subscriber acquisition costs, programming costs, operational and general and administrative ("G&A") costs and reduced churn.[29] Importantly, the synergies analysis used various Wall Street consensus figures (not the Applicants' own estimates) as the starting point for nearly all projections, including subscriber count, chum, subscriber acquisition costs, average revenue per user, programming costs and G&A costs. Use of consensus figures as a baseline, and other

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[28] ***See e.g., Ex Parte*** Letter from Pantelis Michalopoulos, Counsel to EchoStar Communications Corporation, and Gary M. Epstein, Counsel to General Motors Corporation and Hughes Electronics Corporation, to Marlene H. Dortch (July 5, 2002) (containing presentation detailing the benefits projected to flow from the applicants' proposed merger including cost savings and revenue synergies); ***Ex Parte*** Letter from Pantelis Michalopoulos, Counsel to EchoStar Communications Corporation, and Gary M. Epstein, Counsel to General Motors Corporation and Hughes Electronics Corporation, to Marlene H. Dortch (Sept. 20,2002) (documenting significant merger-specific efficiencies).

[29] ***See generally id.***

conservative assumptions, may substantially *understate* the value of synergies resulting from the merger. In addition, while certain petitioners objected to the Applicants' claim of synergies in general, no one objected specifically to the Applicants' quantification of the synergies (the July 5, 2002 presentation) or the detailed backup submitted by the Applicants on September 20, 2002. Yet the Commission, for various unsupported reasons, apparently discounted the Applicants' well-documented synergies in their entirety."

In the *AT&T/Comcast* proceeding, by comparison, the efficiencies estimates that the parties produced fall far short of these submissions. The parties stated generally that their merger "will create efficiencies and synergies that will allow AT&T Comcast to accelerate the availability of local telephony, digital video, high-speed Internet service, and other broadband services to millions of residential consumers in areas of 41 states" and "provide a competitive spur to other entities, including incumbent telephone companies, nationwide [DBS] providers, and others."[31] While Robert Peck, Senior Vice President of Corporate Development at Comcast

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[30] For example, with respect to revenue synergies the Commission incorrectly suggests that the Applicants did not properly estimate the incremental profit that would result from new services. See *HDO* at ¶ 204. However, because such services would not be offered absent the merger, that is precisely what the Applicants demonstrated. The Commission goes on to say, however, that even if the Applicants had properly estimated these synergies, "this would not necessarily provide a clear picture of the net gain in social welfare" because some of the gain may come from customers switching from cable. In so doing, the Commission established a standard that is as impossible to meet as it is to apply: Applicants may become better competitors as a result of a merger, but the synergies of the transaction must be reduced precisely because they are better competitors. Similarly, on the cost reduction side of the synergies analysis, the Commission ignored the fundamental economies of scale associated with combining the EchoStar and DIRECTV customer bases on programming, equipment and other costs. *See HDO* at ¶ 208. Furthermore. in disregarding the Applicants' estimate of the net present value of future synergies that will accrue in the "out years" after the merger, it ignored billions of dollars in synergies that will be realized in the near term. *See HDO* at ¶ 209.

[31] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses, Comcast Corporalion and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Applications and Public Interest Statement, Description of Transactions, Public

Corporation, attempted to quantify the extent of these efficiencies and synergies by stating that the merger "should result in synergies and efficiencies worth approximately $1.25 to $1.95 billion a year in increased earnings before interest, tax, depreciation and amortization ("EBITDA"),"[32] he seems to have provided little evidence, and no model, to substantiate the estimates provided. Later in the proceeding, Steve Burke, President of Comcast Cable, reaffirmed the initial $1.25-1.95 billion synergy estimate provided by Mr. Pick, but similarly Tailed to provide any concrete evidence to substantiate the estimates.[33]

Moreover, Mr. Pick stated that the projections and estimates provided are "necessarily based upon incomplete data and [are] inherently inexact." Mr. Peck also acknowledged that "in the course of calculating potential synergies and efficiencies, it was necessary to rely upon the accuracy of data supplied to us and to make certain simplifying assumptions and estimates, which inevitably injected a level of uncertainty into the analysis."[34] In addition, he noted that while some of these synergies and efficiencies "should be realized immediately or very soon after closing," more than half of them may not be realized for 3 or

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Interest Showing and Related Demonstrations at 28-29 (Feb. 28, 2002) ("AT&T/Comcast Application").

[32] AT&T/Comcast Application, Declaration of Robert Pick, at *3* ("Pick Declaration"). Mr. Peck also states that the aforementioned cost savings estimates do not include an estimated $200 to $300 million a year in savings on capital expenditures. *Id.*

[33] ***See*** Letter from **A.** Renee Callahan, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary, FCC, at 28 ("Value Creations Through Synergies" presented **by** Steve Burke, President, Comcast Cable) (Redacted Version) (July 2,2002). In his presentation, Mr. Burke lists the following five sources for the estimated synergies: (1) "programming cost savings"; (2) "continued operating efficiencies"; (3) "national advertising platform"; (4) "new products"; and *(5)* "Comcast telephony." ***See*** id.

[34] Pick Declaration at 3-4.

more years following the closing and his cautionary language indicates that others may not be obtained at all.[35] Other submissions of synergies estimates in other proceedings are no different.

Of course, even the best synergies estimates are just that – estimates of things expected to happen in the future. Yet the Commission, while seeing no serious problem with the "inexact[ness]" and the three years or more time frame for most of the benefits claimed in the AT&T/Comcast case, found these factors to be debilitating obstacles in this proceeding, stating with respect to the time frame: "[M]any of the Applicants' efficiency claims are inherently speculative because they are not projected to occur until three or more years after consummation of the merger."[36] And the Commission found faults in the itemized backup submitted by the Applicants, while AT&T and Comcast do not appear to have submitted any detailed itemization or backup whatsoever. In short, the Commission subjected the Applicants to disparate treatment by holding them to a more exacting standard of proof than in other complex merger proceedings. In fact, it appears that the only possible way to overcome the evidentiary hurdles erected by the Commission here would be if the Applicants had already consummated the transaction and had been able to observe empirically its benefits.

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[35] *Id.* at 3.

[36] **See** *HDO* at ¶ 202. ***See*** also *id.* ("Another problem with the Applicants' efficiency showing is that many of the claimed benefits appear highly speculative."); ***id.*** at ¶209 ("[M]any of their other claimed cost savings appear to be either speculative or lacking in credibility."); ***id.*** at ¶ 213; ***id.*** at ¶ 227 ("Clearly, the nascent state of this potential future service raises questions and uncertainties both as to the timing and scope of its implementation and as to the quality and price that will be achieved that cannot reasonably be answered at this time. Thus, it is highly speculative whether this alleged merger benefit will come into fruition within a reasonable timeframe."); ***id.*** at ¶ 229 ("Based on the record evidence, we find that the Applicants have failed to demonstrate that the Merger will result in cognizable public interest benefits related to satellite broadband service. More specifically,. . . .we find that Applicants' benefits claims are speculative and not credible and do not appear to be merger specific.").

The unreasonably short time frame imposed by the Commission on recognition of benefits can be contrasted not only with *AT&T/Comcast* and other merger proceedings, but also with the Commission policies evident in every single satellite licensing proceeding. By their nature, satellites take a relatively long time to build, and New EchoStar I is no exception. For that reason, the benefits claimed by satellite applicants are typically expected to accrue over protracted periods of time – as much as 6 years from grant. This time frame, however, has not until this proceeding prevented the Commission from basing its public interest findings on precisely such claimed benefits.[37] To refuse to recognize a benefit because it would accrue more than three years after the Commission action is literally shortsighted, especially in the context of the satellite industry, and does not serve the public interest.

The Commission's criticism that the synergies model does not distinguish between public and private benefits is another example of discriminatory treatment at the Applicants' expense. In fact, synergies models submitted in other merger proceedings have not distinguished between public and private benefits, and the synergies presentation made by AT&T and Comcast does not appear to have done so either.[38] Thus, the public record suggests that AT&T and Comcast did not submit a breakdown showing what portion if their $1.25-1.95 billion synergies estimate would inure to the public. In fact, that distinction is the task of the economic experts who consider the efficiencies expected from the merger in conjunction with

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[37] *See, e.g., Application of Iridium LLC*, 16 FCC Rcd 13778 (2001) (2 GHz Mobile Satellite Service space station authorization with operational milestone six years from date of authorization); *Loral Space & Communications Ltd.*, 13 FCC Rcd 1379 (1997) (first-round Ka-band Fixed-Satellite Service authorization without any specific implementation milestones because inter-satellite link frequency assignments could not be made at time of licensing).

[38] *See e.g.*, AT&T/Comcast Application at 31 and Pick Declaration at 3 ("within five years, the Merger should result in synergies and efficiencies worth approximately $1.25 to $1.95 billion a year in increased Earnings Before Interest, Tax, Depreciation and Amortization.")

the expected intensity of post-merger competition, and estimate how many of these efficiencies will redound to the benefit of the consumer. The Applicants' experts did so and were deliberately conservative, since they considered only a small portion of the efficiency benefits shown by the Applicants. The Commission ignored that work, however. At the same time, the Commission was not troubled by the absence of the distinction between public and private benefits from the AT&T/Comcast presentation, even though in that case each merger partner, even standing alone, is a dominant provider of both MVPD and broadband service.

Local-info-Local. In assessing the stand-alone capabilities of each company, the Commission apparently took the number of cities that each company serves (or will serve) with one spot-beam satellite, and then doubled that number on the theory that each company's second spot-beam satellite will result in a doubling of that capacity." The Commission therefore spent a few lines to dispose of a complex question that the Applicants and their opponents had debated in hundreds of pages.[40] "Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet" even the deferential standard of reasoned agency decisionmaking.[41]

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[39] *HDO* at ¶ 78 ("[T]he latest satellites offer significant improvements in spectrum efficiency through the use of spot beams. These new satellites effectively double the capacity to offer local channels for each company. Therefore, given that EchoStar and DirecTV each currently provide local service to approximately 40 markets, we believe it is reasonable to anticipate that, without the merger, [each] company would be able to offer local broadcasting service to 80 to 100 DMAs within the next one to two years.")

[40] See, *e.g.*, *Opposition* at 3-20 and Exhibit B (Declaration of Dr. Richard J. Barnett); *Ex Parte* Letter from Pantelis Michalopoulos, Counsel for EchoStar Communications Corporation, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, to Marlene H. Dortch (Aug. 2,2002); *Ex Parte* Reply Comments of Applicants at 5 and Volume I, Exhibit 3; Pegasus Petition to Deny at 49-53 (Feb. 4, 2002); NAB Petition to Deny at 74-89 (Feb. 4, 2002).

[41] *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959,968 (D.C. Cir. 2001)

Even more important, the Commission did not look beyond technical capabilities: it did not at all consider the central question of economic viability,[42] even though in the *AT&T/Comcast* proceeding, for example, it recognized the high fixed costs of residential broadband service as a legitimate impediment. With respect to local-into-local, the question of economic viability is related to the huge costs of local-into-local service, including the spectrum opportunity cost resulting from displacement of national programming to make room for local stations. Even NRTC, while vehemently opposing the merger, has acknowledged that these costs preclude each of the two companies from providing local-into-local service to the entire nation.[43] On that question, the Applicants had shown that "DIRECTV would not likely serve more than about 70 DMAs. . . due to the opportunity costs and expected returns, and likely would serve less."[44] As to EchoStar, the Applicants had stated that EchoStar expects to be able to serve approximately 50 DMAs from its CONUS capacity with its two spot-beam satellites in place.[45] Dr. Willig's Reply Declaration explained the commercial feasibility and opportunity cost factors.[46] In addition, on August 2,2002, the Applicants submitted detailed econometric

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[42] ***See Hearing*** *Designation* ***Order*** at ¶ 78.

[43] ***See*** Joint Comments of the National Rural Telecommunications Cooperative, the National Rural Electric Cooperative Association and the National Rural Utilities Cooperative Finance Corporation at 13-14 (May **30,** 2002) (filed with Rural Utilities Service of the Department of Agriculture)("While it appears to be technologically possible for both carriers to offer all broadcast signals to all Americans, the provision of local signals in smaller markets is not likely to generate enough profit to entice DIRECTV and EchoStar to build additional spot beam capacity for local signal distribution.").

[44] *Opposition* at 15

[45] *Id.* at 12. EchoStar had also specifically rebutted on technical grounds NRTC's allegation that these two satellites would enable EchoStar *to* provide **all** local stations to 80 DMAs (the low end of the range that the Commission has derived by multiplying the number of cities by two). ***Id.*** at 13. The Commission never addressed that disagreement.

[46] ***See id.,*** Willig Reply Declaration at ¶¶ 9-17.

models showing that neither company alone would find it economic to serve more than a limited number of DMAs – again, in all probability, significantly fewer than the 80-100 range reached by the Commission.[47] These models were never disputed by any party in the record, and were not discussed by the Commission in relation to its 80-100 DMA finding. The Commission disregarded these submissions on the question of the companies' stand-alone capability and opted instead for a back-of-the envelope calculation.

The Commission's disregard for the cost of local-into-local service in evaluating each company's capabilities is, moreover, strikingly inconsistent with the Commission's reliance on precisely that cost to question the merged company's promise that it will provide local-into-local service throughout the country.[48] In other words, in the Commission's eyes, cost is not an issue for each company standing alone, but becomes a debilitating problem for the merged company. In reality, of course, the opportunity cost of the spectrum is higher for each stand-alone company, since each applicant is much more spectrum-constrained than the merged company would be, not the other way round.[49]

Competitive effects. The failure of the *HDO* to apply many of the policies exemplified in the *AT&T/Comcast* decision was compounded by the misapplication of

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[47] ***See Ex Parte*** Letter from Pantelis Michalopoulos, Counsel for EchoStar Communications Corporation, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, to Marlene H. Dortch (Aug. 2, 2002).

[48] *HDO* at ¶ 203.

[49] Applying the same double standard, the *HDO* casts doubt on the Applicants' plan to serve all 210 DMAs on the ground that the plan assumes carriage of standard definition local channels. ***See*** *HDO* at ¶ 202. This is of course correct, but the *HDO* does not explain why it is relevant only to the capabilities of the combined company and not to the stand-alone capabilities of each company. Any requirement of carrying HDTV local feeds would cripple each company in its attempts to provide local-into-local service. Each company would only be able to provide such service only in a fraction of the cities it serves now, and would certainly not be able to expand that number, let alone serve 80-100 cities as the Commission has found.

Commission policies to facts that were in part undisputed when it came to assessing the competitive effects of the EchoStar/Hughes merger. The Commission dismissed the simulation of the public welfare benefits conducted by the Applicants' economic experts -- found to be more than $1.7 billion a year on very conservative assumptions -- by stating that the elasticities estimates of the analysis were "fatally flawed' and explaining very little beyond that.[50] More specifically, the Commission all but ignored the cornerstone of the Applicants' elasticity estimates – the diversion rates.[51] With respect to those rates, the Commission said only that, depending on the criteria for using the chum survey data evaluated by the Applicants' experts, the diversion rate between the two companies could be higher.[52]

This reasoning does not comply with the requirement of reasoned decision-making for two reasons: *first*, the Commission did not even cite the painstaking comparison of the two companies' subscriber databases done by the Applicants' experts, which shows the actual diversion rate between the two companies to be *lower* than suggested by the survey data under any set of standards.[53] These findings were disregarded even though they were *completely undisputed* in the record below. *Second,* the *HDO* substitutes higher chum numbers for those used by the Applicants without offering any explanation as to why these higher numbers are more correct.[54]

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[50] *See HDO* at ¶ 160, Appendix E at ¶ 23.

[51] *See generally id.* at ¶¶ 26-29

[52] See id. at ¶ 26.

[53] *See* Economists Report on Further Analysis of the Diversion Ratio Between EchoStar and DIRECTV (September 13,2002).

[54] *See HDO,* Appendix E at ¶ 30.

Even so, many of the Commission's own calculations based on these higher rates resulted in significant net consumer benefits." In disregard for its policy of promoting consumer welfare, however, the Commission chose to ignore these calculations and focused instead on its worst-case estimate. That estimate uses an astronomically high diversion rate between the companies that, even according to the Commission analysis cannot be the correct nationwide rate, but the Commission nevertheless applies it throughout the nation. That is, in producing its worst-case scenario, the Commission appears to assume contrary to reality that cable does not exist anywhere in the country,[56] disregarding its repeated recognition of cable operators as the dominant providers in the MVPD **market.** The Commission's worst-case estimate also assumes that the merger will produce no marginal cost benefits whatsoever, and therefore does not balance the perceived harms against any benefits, contrary to the Commission's own recognition that the merger will in fact result in some significant benefits.

In addition to substituting its own numbers in the Applicants' merger simulation, the Commission conducted its own "analysis," which the Commission itself recognized as "tentative" and only relevant until a "more reliable" and "verifiable" estimate is developed.[57] It appears from that description that the Commission's analysis did not recognize ***any*** merger benefits and took account only of the reduction in the number of competitors. This is wrong for two reasons. *First,* it is inconsistent with the Commission's own recognition that the merger stands to produce at least some benefits.[58] *Second,* such an analysis proves nothing. ***Any*** merger

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[55] *See id.*

[56] See ***HDO,*** Appendix E, at ¶¶26, *30* (it appears that the Commission's worst case "sensitivity analysis" assumes the entire nation is unserved by cable).

[57] See ***id.*** at ¶¶ 30-35.

[58] See ***id.*** at ¶ 77.

of competitors in the same market leads to a reduction in the number of competitors (in the absence of new entry) and any analysis that does not take into account the efficiencies associated with that merger would therefore project a welfare loss for consumers – a sterile and tautological exercise that begs the real question and would lead, if it were relevant, to denial of every single merger proposal other than conglomerate mergers. Finally, the ***HDO*** does not even reveal the results of the staff's analysis – an obvious lapse of the Commission's responsibilities under the APA

II. THE COMMISSION HAS ABDICATED ITS STATUTORY RESPONSIBILITY TO PROMOTE THE INTERESTS OF RURAL SUBSCRIBERS, WHO, WHILE FEW IN NUMBER, LIVE IN THE MANY UNDERSERVED AREAS OF THE COUNTRY

On undisputed facts, the Commission has also misapplied its policy of promoting the interest of rural consumers. Correct application of that policy tilts the benefit/harm balance even further in favor of grant, and at least creates "substantial doubt" as to whether a hearing should be held

Even under the Commission's faulty analysis of each applicant's ability to provide local-into-local service, it is another undisputed fact that 110-130 **DMAs** throughout the country will probably never get local stations by satellite without the merger.[59] The Commission has improperly dismissed that **risk** by reasoning that these areas account for only **a** "small percentage" of the nation's population -- 15% - 20% of TV households.[60] The Commission's

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[59] *See HDO* at ¶ 78 ("[W]e believe that it is reasonable to anticipate that, without the merger, [each] company would be able to offer local broadcasting service to 80 to 100 DMAs within the next one to two years.").

[60] *Id.* at ¶ 78 ("This would permit the Applicants to serve about 80-85% of TV households with local-into-local without the merger."); *see also Hearing id.* at ¶ 80 ("Therefore, any merger-specific benefits that the merger might produce with respect to local-into-local service would, at best, accrue to a small percentage of potential viewers.").

casual dismissal of this "small percentage" of TV households is surprising because it includes millions of rural subscribers in numerous states.[61] In its effort to preserve competition between DBS providers for this "small percentage" of TV households, the Commission has succeeded in preventing these subscribers from receiving *any* local-into-local programming. Moreover, these potential rural subscribers, as well as subscribers in urban areas, will in all likelihood be deprived of satellite-delivered residential broadband service. With the spectrum capacity and economies of scale that New EchoStar would derive, the merger presents the most realistic way for these rural consumers to receive any broadband service, and it presents an efficient way to create effective residential broadband competition for all remaining consumers. Nevertheless, the Commission gives little pause to the effects of its decision and seems content to conclude that it is in the public interest to deprive millions of rural consumers of the tremendous benefits and advantages that the rest of the country enjoys in receiving local-into-local and broadband services.

A consumer living in DMA 210, however, should be treated the same as, and indeed more solicitously than, one living in the largest DMA under the Commission's statutory responsibilities. To treat the consumers in rural areas otherwise would be to cast doubt as to whether the Commission is following its mandate to fully evaluate the public interest, which

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[61] *See Notice of Ex Parte Presentation filed by* ***National Strategies, Inc. and*** *RFD-TV* (Oct. 16, 2002) ("It was also noted that even if, as an FCC source recently suggested, but which RFD doubts to be likely. 85% of Americans were to have access to local channels via satellite without the merger, about 40 states would have viewers in the 15% that would be left behind. Some states like Montana, North Dakota, South Dakota and Wyoming would likely have no local channels. That 15% could represent a substantial percentage of the geography of the United States. The status quo represents a "no-opoly" local service and broadband service to thousands of rural Amencans.").

necessarily includes the "public" in both urban ***and*** rural areas, under Sections 214(a) and 310(d) of the Communications Act."

III. THE *HDO* MISSTATES THE COMMISSION'S SPECTRUM POLICY PRECEDENT

The Commission's "spectrum policy" concern with allowing one company to control all DBS locations that have nationwide coverage is another instance of misapplying a Commission policy to undisputed facts. First of all, that concern is based on a gerrymandered subset of the spectrum – not even the *HDO* maintains that there is a relevant full-CONUS DBS market. The locations in question are not the only ones allocated to the DBS service. In any event, the *HDO* is flatly wrong that the Commission has never "permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service,"[63] or that the Applicants "have cited no example" where the Commission has done so.[64]

Not so. The Applicants' Opposition to Petitions to Deny the Application, filed February 25, 2002, points out that the Commission has, in fact, sanctioned the use of the spectrum allocated to a particular service by one licensee. **See** *Opposition* at 33. When the Commission first established the Mobile Satellite Service ("MSS") in the L-band, it received competing Applications from 12 companies, invited all the Applicants to form one consortium, American Mobile Satellite Corporation, and gave one license to that entity. The Commission purposefully elected to license one large consortium as opposed to multiple smaller entities because, among other things: a larger amount of bandwidth would permit a greater variety of

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[62] 47 U.S.C. §§ 214(a) and 310(d).

[63] *HDO* at ¶ 277.

[64] *Id.*

services to be provided by an MSS system, and a larger customer base to be served; the high cost of an MSS system and the amount of spectrum available for **MSS** warranted the licensing of one initial MSS system using the entire allocated spectrum; and joint ownership of an **MSS** system would best permit **a** variety of competitive mobile satellite services to be made expeditiously available to the public.[65]

These same considerations would justify to a much greater extent here the creation of New EchoStar even if there were not ample other spectrum in the same band available for other competing providers.

IV. CONCLUSION

For the foregoing reasons, the Applicants respectfully request that, if the Commission does not suspend the hearing, the Presiding Officer or Chief Administrative Law Judge certify to the Commission as soon as possible the question whether a hearing should be

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[65] *See Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services,* 2 FCC Rcd. 485 (1987), *recon. denied,* 4 FCC Rcd. 6016 (1989); *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use* of *Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Currier Services,* 4 FCC Rcd. 6041 (1989), *rev'd in part and remanded, Aeronautical Radio. Inc. v. FCC,* 928 F.2d 428 (D.C. Cir. 1991), *on remand, Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Mobile Satellite Service for the Provision of Various Common Carrier Services,* 6 FCC Rcd. 4900 (Aug. 2. 1991); *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services,* 7 FCC Rcd. 266 (1992), *petitions for review dismissed, Aeronautical Radio. Inc. v. FCC,* 983 F.2d 275 (D.C. Cir. 1993).

held. By filing this Request, the Applicants specifically do not waive their right to amend the Application and seek suspension of the hearing pending Commission review.

Respectfully submitted,

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November 18,2002

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2002, a copy of the foregoing was sent by first-class mail (or by hand delivery as indicated by asterisk) to the following:

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